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IN THE

Supreme Court of the United States

TERM, 1973

No.

~~73~~-234

SAFEGUARD MUTUAL INSURANCE CO.,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA

and

COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The Petitioner, Safeguard Mutual Insurance Co., prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of Pennsylvania rendered in these proceedings on May 4, 1973.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania, — Pa. — , 303 A.2d 822, appears at Appendix A, *infra,* pp. . The Opinion of the Supreme Court of Pennsylvania in a companion case, including the dissenting Opinion therein, — Pa. —, 301 A.2d 849, appears at Appendix B, *infra,* pp. . The Supreme Court of Pennsylvania affirmed the Judgment of the Commonwealth Court of Pennsylvania sustaining preliminary objections of the Commonwealth and dismissing Petitioner's Complaint without Opinion.

JURISDICTION

The Order or Judgment of the Supreme Court of Pennsylvania was entered on May 4. 1973. See Appendix A. p. , *infra.* This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 42 U.S.C. §§1981 to 1988 inclusive; 28 U.S.C. §§1157 and 1343, and 15 U.S.C. §1011-1015, inclusive.

QUESTIONS PRESENTED

1. Where the state regulates the Insurance Business in an area of Law Constitutionally controlled by the Federal Government under the Commerce Clause and delegated to the state for its regulation by Federal statute, may the state violate the Civil Rights of its citizens causing damages to them and then invoke in its defense to claims for damages based on violations of those rights the Doctrine of State immunity from suit, known as Soverign Immunity, or does the State Action regulating such Insurance Business constitute a waiver of State immunity to suit.

2. Where the State takes the property of its citizens by the actions of state officials administering the insurance industry, are those citizens entitled to just compensation for the taking under the Fourteenth Amendment and Fifth Amendment.

3. Is the Application of the Pennsylvania Doctrine of State immunity to suit under the circumstances of this case in violation of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article 1, Section 10:

"No State shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; Coin Money; Emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, Ex Post Facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

"No State shall without the Consent of the Congress lay any Imposts or Duties or Imposts or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any state on Import or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

Constitution of the United States, Amendment XIV, Section 1:

". . . Nor shall any State deprive any person of life, liberty or property without due process of Law . . ."

Constitution of the United States, Amendment X:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution of the United States, Amendment V:

"... Nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of Pennsylvania, Article I, Section II:

"... Suits may be brought against the Commonwealth in such manner, in such Courts and in such cases as the Legislature may by law direct."

STATUTES INVOLVED

McCarran Act, 59 Stat. 33, 15 U.S.C. §§1011-1015, which provides as follows:

"Sec. 1, Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

"Sec. 2(a). The business of insurance, and every person engaged therein, shall be subject to the Laws of the several States which relate to the regulation or taxation of such business."

(b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . ."

42 U.S.C. §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action of law, suit in Equity, or other proper proceeding for redress."

42 U.S.C. §1988: "The jurisdiction in civil . . . matters conferred on the District Courts by (the Civil Rights Act) . . . for the protection of all persons in the United States in their Civil Rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the Constitution and Statutes of the State wherein the Court having jurisdiction of such Civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said Courts in the trial and disposition of the cause . . ."

28 U.S.C. §1343(4): (Section 1343 grants jurisdiction to the Federal District Courts to hear any civil action) "Commenced by any person . . . to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil right . . ."

Act of 1921, May 17, P.L. 789, Art. V, Sec. 502; 1935, July 12, P.L. 958, sec. 1; 1956, March 22, P.L. (1955 and 1928) sec. 2, 40 P.S. 202: "Whenever any domestic insurance company . . . (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policy-holders, or to its creditors, or to the public; . . . the Insurance Commissioner, after examination, shall suspend the entire business of any such domestic Insurance Company . . . upon suspension of any such

organization by the Insurance Commissioner upon any of the grounds set forth in any one of the provisions (a) to (h) inclusive of this section, he shall after approval of the Attorney General apply to the Court of Common Pleas of Dauphin County, . . . for an Order directing such Company, . . . to show cause why its business should not be closed, and the Insurance Commissioner should not take possession of its property and conduct its business, and for such other relief as the nature of the case on the interests of its policyholders, creditors, stockholders, or the public may require."

STATEMENT OF FACTS

The facts relevant to the questions presented by this Petition arose from the suspension of Safeguard Mutual Insurance Company on April 12, 1967 by the Insurance Commissioner of the Commonwealth of Pennsylvania. The Order of suspension by the Insurance Commissioner was instituted under 40 Purdon's Statutes §202, which act permitted suspension of the Company without trial by Jury, without setting forth standards for the guidance of the Insurance Commissioner in issuing an Order of suspension and which allowed an arbitrary procedure of suspension without notice, without requirement that factual assertions of the reasons for suspension be set forth and without requiring that a hearing be held before suspension where evidence could be presented or findings of fact could be made based upon the evidence. The act permitted the filing of a Petition for suspension which set forth no factual averments supporting the request for suspension and without requiring any action by a State Court prior to its issuance or after its issuance, and without requiring a bond or other security to idemnify the subject of the suspension for damages which might be sustained should such Order of suspension prove to be erroneous or wrongful.

In addition prior to the Order of suspension of Safeguard Mutual Insurance Company it was the practice and procedure of the Insurance Department in Pennsylvania to notify an Insurance Company of complaints against it as they arose; it was and is the practice of the Insurance Department to notify Company officers of complaints the Department had against the Company; hold a conference with Company officers to discuss the complaints; issue a report of examination and furnish a copy thereof to the Company; and allow the Company thirty days after issuance of the

report to explain their side of the complaint set forth in the report. In the instant case there were no conferences between Safeguard Mutual Insurance Company and the Insurance Department pertaining to the contents of the Report of Examination prior to the time of suspension; further, it was contrary to the policy of the Insurance Department and no prior cases are recorded thereof for an Insurance Company to be given a Report of Examination one day and to be suspended the next; further, the practice of the Pennsylvania Insurance Department was never to suspend an Insurance Company unless it was both insolvent and in a hazardous condition; under the policy and practice of the Insurance Department it was the obligation of the senior examiner present to call any serious complaints to the Company's attention; no serious complaints were called to the Company's attention at the time of its final examination; the Report of Examination presented to the company one day prior to suspension did not inform them of any violation of law or other charges against it which would justify the issuance of a suspension Order.

After the suspension Order was issued the Insurance Department issued press releases to newspapers and radio stations announcing the suspension of the Safeguard Mutual Insurance Company because of alleged insolvency and hazardous practices; eight or nine Insurance Department examiners came to the company's offices on April 12, 1967, the day of suspension, and remained inside the premises for a period of three or four months without permission; the Insurance Department caused uniformed members of the Philadelphia Police Department to be stationed inside and outside the Company's premises for a substantial period of time immediately following April 12, 1967; these police officers stopped all officers, employees and visitors of the company coming into the premises, demanded their names

and addresses and demanded their names and addresses at the time they left the premises; three uniformed Philadelphia Policemen were kept inside the premises of the Company for a considerable length of time; everyone who came to the offices of the Company during the period of suspension was searched either by the Philadelphia Police or examiners for the Insurance Department. The Secretary of the Company was searched and the attorney for the Company, Malcolm H. Waldron, Jr., was arrested on a disorderly conduct charge and taken to a station house; these charges were dismissed.

During the suspension period the Insurance Department sent notices to numerous Insurance Agents, brokers, and policyholders stating that the Company was suspended because it was insolvent and that the Insurance Department would do everything possible to mitigate the effect of this unfortunate insolvency. As a direct result, Liberty Mutual Insurance Company cancelled Safeguard Mutual Insurance Company's blanket insurance policy for fire, theft, dishonesty, etc., and the Company's credit was impaired with financial institutions, agents, brokers, insurance companies and other businessmen and creditors.

On several occasions during the suspensions, the Insurance Commissioner refused to approve payment by the Company of its officers and employees salaries and other normal operating expenses such as accountants fees, attorneys fees, rent, light bill, heat bill, telephone bill and taxes, as a direct result of which the company sustained injuries to its credit and financial standing in the community and lost numerous highly trained competent employees.

After the case had been heard and argued in the Commonwealth Court of Pennsylvania, *Commonwealth of Pennsylvania, ex rel, David O. Maxwell v. Safeguard*

Mutual Insurance Company, Commonwealth Docket 1967, No. 134, the Insurance Department on December 3, 1969 refused to approve the payment by the Company of its officers and employees, its accountants and attorneys, as a result of which the company did not have the services of its officers, employees or accountants from December 3, 1969, up to April 14, 1970, when the Dauphin Ccunty Court, sitting as Commonwealth Court, entered its Order vacating the suspension and refusing the Insurance Departments Request for Statutory Liquidation, a ruling completely in favor of Safeguard Mutual Insurance Company.

On September 25, 1969 the Court of Common Pleas of Dauphin County, sitting as Commonwealth Docket 1967, No. 134 found that the Commonwealth had failed to sustain its burden of proof on its Petition for Statutory Liquidation and that Safeguard had sustained its burden of proof on its Petition to vacate the suspension order.

This Order of the Commonwealth Court of Pennsylvania did not become a final Order until April 14, 1970 as a result of exceptions filed to the Courts decision of September 25, 1969.

From March 18, 1970 up to July 15, 1970 officials of the Insurance Department continued to attempt to harass Safeguard Mutual Insurance Company's officers and employees.

As a result of the above, Safeguard Mutual Insurance Company filed a Complaint sounding in Trespass and Assumpsit against the Commonwealth of Pennsylvania and against the Commonwealth of Pennsylvania Insurance Department charging that the actions causing damage to it were performed or caused or failed to occur as a result of the conduct of the officials, officers, agents, servants and/or employees of the Commonwealth of Pennsylvania

who acted within the scope of their apparent authority and under color of state law.

Safeguard claimed expenses in connection with the law suits involved in the sum of approximately $749,354.00. Safeguard as a direct result of the illegal conduct of the Commonwealth of Pennsylvania and the Commonwealth of Pennsylvania Insurance Department suffered losses in the sum of $11,970,614.00, which losses were alleged to be continuing in nature. Safeguard also demanded compensatory damages in the sum of $12,719,968.00.

To this action in Trespass and Assumpsit the Commonwealth of Pennsylvania and the Commonwealth of Pennsylvania Insurance Department filed a Motion to Dismiss Plaintiff's Complaint and a Demurrer to Plaintiff's Complaint. The Commonwealth Court sustained the Commonwealth's Demurrer. After Appeal to the Supreme Court of Pennsylvania, in a *Per Curiam* opinion filed May 4, 1973, the Supreme Court affirmed the Order of the Commonwealth Court, with three Justices dissenting, for the reasons expressed in *Biello v. Liquor Control Board*, — Pa. —, 301 A.2d 849, attached hereto as Appendix "B", pp. —, *infra*.

In essence, in *Biello v. Liquor Control Board*, and in the *Per Curiam* opinion in the instant case the Pennsylvania Supreme Court affirmed the doctrine of sovereign immunity as a full defense to the liability of an agency of the Commonwealth of Pennsylvania from actions in tort or Assumpsit. The Dissenting Opinion in *Biello* flatly stated: "Again, the majority of this Court has refused to accept its responsibility and strike down an anachronism in the law of Pennsylvania known as sovereign immunity." Appendix "B", pp. —, *infra*.

REASONS FOR GRANTING THE WRIT

1. Regulation of the State Insurance business by Pennsylvania constituted a waiver of the State's immunity to suit.

This Court held in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162 (1944) that Insurance companies engaged in multi-state operations were doing business in interstate commerce and subject to the restraints of the Sherman Act. This decision raised questions respecting the continued validity of State regulation and taxation of the business conducted by foreign Insurance corporations. To meet this situation Congress enacted the *McCarran Act*, 59 Stat. 33, 15 U.S.C.A. §§1011-1015, which provided that continued regulation and taxation by the several states of the business of Insurance was in the public interest and that business of Insurance and every person engaged therein would be subject to the laws of the several States which related to the regulation or taxation of the Insurance business.

Pursuant to the *McCarran Act, supra*, Pennsylvania passed *"The Insurance Company Law of 1921."* 1921, May 17, P.L. 789, as amended 40 Purdon's Statutes §1, *et seq*. As set forth in its complaint Safeguard, Petitioner herein, was suspended under §508 of the Act as amended, 40 Purdon's Statutes §202, which suspension was held to be invalid by the decision of the Dauphin County Court sitting as Commonwealth Court in April 1970. Safeguard's illegal suspension caused damages to it in connection with the law suits involved in the sum of approximately $749,354.00. As a direct result of the illegal conduct of the Commonwealth of Pennsylvania and the Commonwealth of Pennsylvania Insurance Department Safeguard suffered consequential losses in the sum of $11,970,614.00,

and compensatory damages in the sum of $12,719,968.00. These damages were occasioned as the direct result of actions by officials of the State Insurance Department pursuant to the *Insurance Company Law of 1921.* These officials reportedly were regulating Safeguard as an Insurance company doing business in Pennsylvania. The actions taken by the State pursuant to the State Act regulating the Insurance business introduced the State into a sphere which was not exclusively within the province of Pennsylvania and entered the State into the regulation of activities which were already subject to Congressional regulation under the *McCarran Act, supra.* Under these circumstances, the State of Pennsylvania subjected itself to Federal regulation as fully as though it were a private person or corporation.

In *Parden v. Terminal Railway of Ala.*, 377 U.S. 184, 84 S.Ct. 1207, this Court held that a State which owns and operates a railroad in interstate commerce may not successfully plead sovereign immunity in a Federal-Court suit brought against the railroad by its employees under the Federal Employers' Liability Act. The United States District Court in Alabama had dismissed the actions on the ground of sovereign immunity. Justice Brennen's Opinion clearly sets forth the rationale of waiver. He states, page 186: "Although the Eleventh Amendment is not in terms applicable here, since Petitioner's are citizens of Alabama, this Court has recognized that an unconsenting State is immune from Federal-Court suits brought by its own citizens as well as by citizens of another State (Cases cited). Nor is the State divested of its immunity 'On the mere ground that the case is one arising under the Constitution or Laws of the United States' (Cases cited). But the immunity may of course be waived; the State's freedom from suit without its consent does not protect it from a suit to which it has consented" (Cases

cited). The Court held that Alabama was subject to suit under the Federal Employer's Liability Act. In this connection Justice Brennen said, page 191: "While a State's immunity from suit by a citizen without its consent has been said to be rooted in the 'inherent nature of sovereignty,' (Cases cited), the State's surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce . . . By empowering Congress to regulate Commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the Congressional regulatory power, it must follow that Application of the Act to such a railroad can not be precluded by sovereign immunity."

A waiver of a State's sovereign immunity was also found to exist by this Court in *Petty v. Tennessee-Missouri Bridge Com.*, 359 U.S. 275, 79 S. Ct. 785. In the *Petty* case this Court held that when Congress, in approving a compact between two states by which a bi-state corporation, having the power to sue and be sued, was established to operate ferries across a navigable river, attached a condition that nothing contained in the compact should be construed to affect, impair or diminish any right, power or jurisdiction of any Court of the United States over or in regard to any navigable waters or any Commerce between the states, it thereby reserved the jurisdiction of the Federal Courts to act in any matter arising under the compact over which Federal Courts would have jurisdiction by virtue of the fact that the river in question was navigable and interstate commerce was involved; hence, notwithstanding that State agencies have, under the Eleventh Amendment, immunity from suit in a Federal Court by citizens of another state unless such immunity is waived, such a bi-state corporation is not immune from suit brought in a Federal Court, under the *Jones Act* (46 U.S.C. §688)

to recover for the death of an employee of the bi-state corporation who was aboard a ferryboat operated by the corporation when it sank. This Court reached the conclusion that the construction of the terms of a compact sanctioned by Congress under Art. 1 §10 Clause 3 of the Constitution presents a Federal question upon which this Court has the final say, and this principle is fully applicable when the contention is that a State has, by compact, waived its immunity from suit. *Petty v. Tennessee/ Missouri Bridge Com., supra.* Further, it has been held that express or implied authority to Governmental instrumentalities to sue and be sued should generally be considered as sufficient to enable suits in tort as well as contract. *Taylor v. New Jersey Highway Authority,* 22 N.J. 454, 126 A.2d 313. It has also been held that Legislative waivers of the immunity of the State to suit, in cases involving independent Governmental instrumentalities, are to be liberally construed. *Taylor v. New Jersey Highway Authority, supra.*

In the instant case the independent Governmental instrumentality was the Pennsylvania Insurance Commission which acted illegally to Petitioner, causing Petitioner severe and substantial damages to the sum of over $12,000,000.00. Petitioner here has sought damages against each Defendant upon several theories, including a common law theory of tort liability and an action for deprivation of civil rights pursuant to *42 U.S.C. §1983,* which provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It is clear that the officials of the Insurance Department in causing damage to Petitioner by their illegal actions, acted under color of state law. Further, Petitioners have a Federal cause of action under *42 U.S.C. §1988*, which reads in relevant part as follows: "The jurisdiction in . . . matters conferred on the District Courts by (The Civil Rights Act) . . ., for the protection of all persons in the United States in their Civil Rights, and for their vindication, shall be exercised and enforced in conformity with the Laws of the United States, so far as such laws are suitable to carry the same effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . ., the common law, as modified and changed by the Constitution and statutes of the State wherein the Court having jurisdiction of such Civil . . . cause is held, so far as the same is not inconsistent with the Constitution and Laws of the United States, shall be extended to and govern the said Courts in the trial and disposition of the cause. . . ." These Federal Civil Rights Statutes constitute a waiver of the sovereign immunity of the State of Pennsylvania to suit in the instant case since they establish a Federal cause of action for Petitioner which should be applicable by him in a suit against the State under State law. See *District of Columbia, Petitioner v. Melvin Carter,* 41 United States Law Week 4127, decided January 10, 1973, as of Number 71-564, and *David Moore et al, Petitioners v. County of Alameda et al,* 41 United States Law Week 4627, decided May 14, 1973.

The State of Pennsylvania by virtue of the *Insurance Company Law of 1921, supra,* regulating the Insurance business, subsequent to passage of the *McCarran Act, supra,* must be deemed to have waived the State's sovereign immunity to suit for damages to Petitioner arising from its regulation of the Insurance business under the

Doctrine of *Parden, Petty, District of Columbia v. Carter and Moore et al v. County of Alameda, supra.*

2. Petitioner is entitled to just compensation for the taking of its property under the Fourteenth and Fifth Amendments to the Constitution.

The Insurance Department of the Commonwealth of Pennsylvania suspended the operation of Safeguard Mutual Insurance Company in April 1967 and until the final Order of the Dauphin County Court of Pennsylvania sitting as Commonwealth Court in April 1970, its assets were effectively in the possession of the Insurance Department of the Commonwealth of Pennsylvania and it could not conduct an Insurance business during the three year period in question, causing direct and consequential damages to the Company in the sum in excess of $12,000,000.00. Under these circumstances there was a taking of property of the Petitioner for which it is entitled to just compensation under the Fourteenth and Fifth Amendments to the Constitution. See *Almota Farmers Elevator and Warehouse Company v. United States,* 41 United States Law Week 4153, decided January 16, 1973. In the *Almota* case this Court said the Fifth Amendment provides that private property shall not be taken for public use without "just compensation." And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. To determine such monetary equivalents, the Court established the concept that the owner is entitled to the fair market value of the property at the time of the taking. The Court also stated that the Constitutional requirement of "just compensation" derives as much content from the basic equitable principle of fairness as it does from technical concepts of property law.

In the instant case $600,000.00 in cash and other assets of Petitioner totalling over $1,000,000.00 were taken in April 1967 and for a period of three years the Company was substantially forced out of business, causing a direct loss of business to it in a sum amounting to over $12,000,000.00. Petitioner is entitled to "just compensation" for this taking. *Almota Farmers Elevator and Warehouse Company v. United States, supra.*

3. The application of the Pennsylvania Doctrine of State immunity to suit under the circumstances of this case is in violation of the Fourteenth Amendment to the Constitution.

The Opinion and Order of the Dauphin County Court of Pennsylvania sitting as the Commonwealth Court in April 1970 clearly established that the Insurance Department of the Commonwealth of Pennsylvania acted illegally in suspending Petitioner from operation in April 1967 and causing as a direct result of its illegal conduct consequential damages to the Petitioner of a sum in excess of $12,000,000.00. The circumstances of the suspension of the Company, the use of the police powers by the Commonwealth, its complete resistance to the acceptance of plain facts clearly establishing the validity of the Petitioner's position in relationship to its illegal suspension, involved a lack of fairness and due process to the Petitioner which justifies this Court in declaring that the Pennsylvania Doctrine of State immunity to suit was in violation of the Fourteenth Amendment. See Dissenting Opinion, *Biello v. Pennsylvania Liquor Control Board,* — Pa. —, 301 A.2d 849, *infra.* In his Dissenting Opinion Mr. Justice Nix of the Pennsylvania Supreme Court said: "Again, the majority of this Court has refused to accept its responsibility and strike down an anachronism in the law of

Pennsylvania known as sovereign immunity. Although this Court and many others throughout this nation have on numerous occasions recognized the doctrine as an obsolete vestige of a distant past, a majority of this Court persists in its refusal to remedy the injustices occasioned by the doctrine offering only the weak protestation that the Court does not possess the power to abolish this doctrine. This conclusion is premised upon the belief that the genesis of sovereign immunity is not common law but rather that it is mandated by the Constitution of this State. Both the history of this doctrine and the clear language of the Constitution of this State refute this premise."

Mr. Justice Nix went on to say: "Whatever validity sovereign immunity may have had in the eighteenth century has disappeared. Modern state governments employ multi-billion dollar budgets to undertake functions which would have been inconceivable under the *laissez faire* philosophy of earlier years. There is absolutely no reason why a state should not insure itself from tort liability (unless it prefers to be self-insured) just as every private enterprise must. The injustice of the doctrine of sovereign immunity is underscored in a case such as the one at bar. Here, the State has entered into the business of selling liquor, and in so doing it reaps millions in profits. Still, the majority invokes the doctrine of sovereign immunity—a doctrine whose only possible rationale was to protect faltering colonial treasuries—to shield these profits from tort liability."

"The overwhelming majority of commentators also conclude that sovereign immunity for tort liability has outlived its usefulness. See *e.g.*, Prosser on Torts, 3d. Ed., p. 1010; Harper, The Law of Torts, (1933); McGuire, "State Liability For Tort," 30 Harv. L. Rev. 20 (1916); Leflar and Kantrowitz, "Tort Liability For States" 29

N.Y.U.L. Rev. 1363 (1954). Several of our sister states have judicially abrogated the doctrine of sovereign immunity. See *e.g.*, *Stone v. Arizona Highway Commission*, 93 *Ariz.* 384, 381 P.2d 107 (1963); *Muskopf v. California Hospital District*, 55 Cal.2d 211, 359 P.2d 457 (1961); *Hopper v. State*, – Idaho –, 473 P.2d 937 (1970); *State v. Turner*, – Ind. –, 286 N.E.2d 697 (1972); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) (*dictum*); *Willis v. Department of Conservation and Economic Development*, 55 N.J. 534, 264 A.2d 34 (1970)."

The Supreme Court of Pennsylvania finally abrogated the outmoded and unjust doctrine of Governmental immunity from suit in the case of *Ayala et al v. Philadelphia Board of Public Education*, decided May 8, 1973 – Pa. –, – A.2d –. In the *Ayala* case, the Supreme Court of Pennsylvania ruled that municipal corporations and quasi-corporations are no longer immune from tort liability. A copy of the Opinion of the Supreme Court of Pennsylvania in the *Ayala* case is made part hereof as Appendix C. In a comprehensive Opinion by Pennsylvania Supreme Court Justice Roberts the Court stated: "We now hold that the doctrine of Governmental immunity, long since devoid of any valid justification, is abolished in this Commonwealth. In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine. Although the Supreme Court of Pennsylvania abrogated the doctrine of Governmental immunity, it stated in a footnote to its Opinion that it was not in the *Ayala* case confronted with the sovereign immunity of the Commonwealth. The compelling reasons cited in the *Ayala* case for the abolition of the doctrine of Governmental immunity as applied to municipal corporations and quasi-corporations, certainly apply with equal and compelling force to the doctrine of sovereign immunity from

suit as applied to the State. There is no basis under the Law or economically or historically for any distinction. A reading of the *Ayala* Opinion leads to the inevitable conclusion that when the Pennsylvania Supreme Court is properly confronted with the decision as to whether to abolish the doctrine of sovereign immunity as it applies to the State of Pennsylvania, it will most certainly do so.

Here the Commonwealth has set out to regulate the Insurance business by virtue of the powers delegated to the States under the Commerce Clause *supra* and the *McCarran Act*. By moving into a sphere which is governed by the Constitution and by Federal Legislation deriving therefrom, where the Federal Government itself would have been liable to suit under the Civil Rights Act as set forth in one hereinabove, the doctrine of sovereign immunity can not be used as a bar to a suit for damages based either upon a tort theory of liability or contractual theory of liability, where the State's independent Governmental instrumentality has caused the damage to its citizen, Petitioner here, by its illegal actions. To say that the outmoded vestige of imperial power known as the Doctrine of Sovereign Immunity should prevent redress of such wrongs is shocking to the fundamental concepts of fairness and due process of law implicit in the Fourteenth Amendment to the Federal Constitution which is applicable to the Commonwealth of Pennsylvania in its relationship to its citizens.

The situation here is analogous to the welfare residency requirements stricken down in *Shapiro v. Thompson*, U.S. Conn., Dist. Col., and E.D. Pa. 1969, 394 U.S. 618, 89 S.Ct. 1322. In *Shapiro v. Thompson*, this Court in an Opinion by Mr. Justice Brennen held that the statutory prohibition of welfare benefits to residents of less than one year in Connecticut, Pennsylvania and the District of

Columbia, created a classification which constituted an invidious discrimination denying those residents the equal protection of the laws. The Court stated that Congress may not authorize a State to violate the Equal Protection Clause. Also, that Congress is without power to enlist the State's co-operation in a joint Federal-State program by legislation which authorizes the States to violate the Equal Protection Clause of the Constitution. And that the Fifth Amendment, while it contained no Equal Protection Clause, does forbid discrimination that is so unjustifiable as to be violative of due process.

In the instant case by dint of the Congressional delagation of power to regulate the Insurance business to the States, if Pennsylvania is permitted to avoid liability to Petitioner by virtue of the doctrine of sovereign immunity, this Court will permit a shocking violation of the Petitioner's right to due process of law under the circumstances as factually set forth above. *Shapiro v. Thompson, supra.*

CONCLUSION

For these reasons, a Writ of Certiorari should Issue to review the Judgment and Opinion of the Supreme Court of Pennsylvania.

Respectfully sbmitted,

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Counselors for Petitioner

APPENDIX A

Here is set forth, the Opinion rendered in the Supreme Court of Pennsylvania in the instant case, *Safeguard Mutual Insurance Company v. Commonwealth of Pennsylvania and Commonwealth of Pennsylvania Insurance Department*, — Pa. —, 303 A.2d 823.

SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

MAY TERM, 1972

No. 80

SAFEFUARD MUTUAL INSURANCE COMPANY,
Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA

and

COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT

APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA, AT No. 278 C.D. 1971, SUSTAINING PRELIMINARY OBJECTIONS OF THE COMMONWEALTH AND DISMISSING THE COMPLAINT OF APPELLANT

ENTERED: FEBRUARY 18, 1972

Opinion of the Court
(Filed May 4, 1973)

PER CURIAM:

Order Affirmed.

Mr. Justice ROBERTS, Mr. Justice NIX, and Mr. Justice MANDERINO dissent for the reasons expressed in Biello vs. Liquor Control Board, – Pa. –, –, – A.2d –, – (1973) (dissenting opinion by NIX, J., in which ROBERTS, J., joined).

APPENDIX B

Here is set forth the Opinion of the Supreme Court of Pennsylvania in *Biello v. Pennsylvania Liquor Control Board*, — Pa. —, 301 A.2d 849.

Joseph S. BIELLO, Administrator of the Estate of Joseph D. Biello, Deceased, Appellant,

v.

PENNSYLVANIA LIQUOR CONTROL BOARD et al., Appellees.

Supreme Court of Pennsylvania.

March 16, 1973.

Action for wrongful death and survival, arising out of the death of a boy following his purchase of a bottle of whiskey from a state liquor store. Preliminary objections were sustained by the Commonwealth Court, No. 728 Transfer Docket 1970, and the administrator of the decedent's estate appealed. The Supreme Court, O'Brien, J., No. 324 January Term, 1971, held that the retail sale of liquor by the Liquor Control Board came within the Commonwealth's regulatory scheme and was an exercise of a governmental function by the Commonwealth, being part of the Commonwealth's comprehensive scheme to regulate the sale and consumption of alcohol, and that sovereign immunity precluded recovery. The court also held that, under a constitutional provision requiring that. if the Commonwealth is to be liable to suit, the legislature direct the "manner and courts" in which such suits may be brought, as well as types of cases in which suit is permitted, a statute making it unlawful for the Liquor Control Board or any employee, servant or agent thereof to sell any liquor to any minor but not imposing any criminal sanction for such sale did not make the Board civilly liable for the consequences of such sales.

Affirmed.

Eagan and Pomeroy, JJ., concurred in result.

Nix, J. dissented and filed opinion in which Roberts, J., joined.

Manderino, J., did not participate in consideration or decision.

1. Constitutional Law—29

States—12

Constitutional provision that suits may be brought against Commonwealth in such manner, in such courts and in such cases as legislature may by law direct is not self-executing, and, absent legislation permitting suits, there could not be recovery in tort from the Commonwealth. P.S.Const. art. 1, §11.

2. States—191(2)

Whether particular action is one against Commonwealth is not be determined solely by reference to nominal parties to record. P.S.Const. art 1, §11.

3. States—112

In applying doctrine of governmental immunity, distinction must be made between governmental and proprietary functions; recovery may be had against the Commonwealth for tort liability arising out of exercise of proprietary function. P.S.Const. art 1, §11.

4. States—112

Retail sale of liquor by Liquor Control Board came within Commonwealth's regulatory scheme and was exercise of governmental function by the Commonwealth, being part of Commonwealth's comprehensive scheme to regulate sale and consumption of alcohol, and sovereign immunity precluded recovery from the Board for death

of boy from consumption of whiskey purchased from state store. P.S.Const. art. 1, §11; 47 P.S. §§1–101 et seq., 4–493(1).

5. Intoxicating Liquors–299

Under constitutional provision requiring that, if Commonwealth is to be liable to suit, legislature direct the "manner and courts" in which such suits may be brought, as well as types of cases in which suit is permitted, statute making it unlawful for Liquor Control Board or any employee, servant or agent thereof to sell any liquor to any minor but not imposing criminal sanction for such sale did not make Board civilly liable for consequences of such sales. P.S.Const. art. 1, §11, 47 P.S. §4–493(1).

6. Constitutional Law–70.1(11)

Sovereign immunity of Commonwealth to recovery of damages for tort could be abrogated only by legislative action. P.S.Const. art. 1, §11; 47 P.S. §4–493(1).

William J. Brickley, Philadelphia, for appellant.

Thomas J. Shannon, Asst. Atty. Gen., J. Leonard Langan, Asst. Atty. Gen., Harrisburg, for appellee, Pa. Liquor Control Bd.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY and NIX, J.J.

OPINION OF THE COURT

O'BRIEN, Justice.

Appellant instituted this action for wrongful death and survival in the Court of Common Pleas, Dauphin County, and named as defendants: The Pennsylvania Liquor Con-

trol Board, the individual members of the board, the Director of State Stores, and the manager of a specific State Store.

Appellant alleged that the decedent, a sixteen-year-old boy, purchased a bottle of Scotch whiskey from a State Store. The boy consumed part of the bottle, became drunk, and, as a result of his intoxicated condition, fell eleven floors from a fire escape to his death.

The Attorney General filed preliminary objections, averring that the Pennsylvania Liquor Control Board is an instrumentality and agency of the Commonwealth; that an action against the board is an action against the Commonwealth; that the Commonwealth cannot be sued without its consent; and that there has been no such consent in this case. Appellant answered these preliminary objections.

The proceeding was transferred subsequently to the Commonwealth Court of Pennsylvania, where the Attornew General's preliminary objections were sustained, with two judges dissenting, Biello v. Pa. Liquor Control Bd., 1 Pa.Cmwlth. 179 (1971), and the complaint was dismissed; this appeal followed.

This case raises the question of the immunity of an agency of the state from actions in tort.

The doctrine of sovereign immunity arrived in Pennsylvania in Respublica v. Sparhawk, 1 Dallas 383, 1 L.Ed. 174 (1788). That case was a suit to recover the value of flour relocated by the Pennsylvania War Board pursuant to a legislative directive to prevent British capture of supplies should they occupy Philadelphia.

The plaintiff in Sparhawk did not contend "that, generally speaking, citizens may sue the State; but only that every Government, which is not absolutely despotic, has provided some means (in England, for instance, by peti-

tion in Chancery) to obtain a redress of injuries from the sovereign." 1 Dallas at 387.

Chief Justice M'Kean responded by affirming the legislature's right to order relocation of private belongings when the necessity of war demands. He was not impressed with the plaintiff's plea that the loss be spread. "It is a rule, however, that it is better to suffer a private mischief, than a public inconvenience; and the rights of necessity for a part of our law." 1 Dallas at 388.

Sparhawk was extended in John Black v. Rempublicam, 1 Yeates 140 (1792), a case in which Pennsylvania galley captains had seized private provisions while fleeing from the British across the Delaware River. The captains used the provisions to feed their own troops and promised the landowner compensation. The court held that since the captains had no authority to contract, there could be no recovery in contract, and, further that Sparhawk precluded recovery in tort.

[1] Were sovereign immunity a creature of pure common law, we might be disposed to a consideration of the abrogation of that much criticized doctrine.[1] However, Article I, Section 11 of the Pennsylvania Constitution, P.S., provides, inter alia: "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." This language consistently has been interpreted to mean that no suit may be maintained against the state in tort until

[1] For a comprehensive list of states that have judicially abrogated sovereign and/or governmental immunity, see the dissents of Justice Roberts in Smeltz v. Harrisburg, 440 Pa. 224, 269 A.2d 466 (1970), and Thomas v. Baird, 433 Pa. 482, 252 A.2d 653 (1969).

For criticism of the injustice wrought by the doctrine, see the dissents of Justice Roberts in Flinchbaugh v. Cornwall-Leb. Sch. Dist., 438 Pa. 407, 264 A.2d 708 (1970), and Laughner v. Allegheny County, 436 Pa. 572, 261 A.2d 607 (1970), and the dissent of Justice Musmanno in Rader v. Pa. Turnpike Commission, 407 Pa. 609, 182 A.2d 199 (1962).

the legislature specifically has provided for such an action. Meagher v. Commonwealth, 439 Pa. 532, 266 A.2d 684 (1970); Bannard v. N. Y. S. Nat. Gas Corp., 404 Pa. 269, 172 A.2d 306 (1961); Brewer v. Commonwealth, 345 Pa. 144, 27 A.2d 53 (1942); Bell Telephone Co. v. Lewis, 313 Pa. 374, 169 A. 571 (1934); Collins v. Commonwealth, 262 Pa. 572, 106 A. 229 (1919); Fitler v. Commonwealth, 31 Pa. 406 (1858). Pennsylvania is thus consistent with the majority of the states of this nation who have refused to treat similiar constitutional provisions as being self-executing[2]. The rationale seems to have been that such a constitutional provision must be strictly construed since it is in derogation of the states' inherent exemption from suit.

[2] The question of whether a particular action is one against the Commonwealth is not to be determined solely by reference to the nominal parties to the record. Rader v. Pa. Turnpike Commission, 407 Pa. 609, 182 A.2d 199 (1962); Merchants' Co. v. Gelder, 349 Pa. 1, 36 A.2d 444 (1944); Bell Telephone Co. v. Lewis, supra. In Rader, this Court held:

> "that the Pennsylvania Turnpike Commission [is] an instrumentality of the Commonwealth engaged in a governmental function and therefore is not liable for . . . injuries and damages in a trespass action." 407 Pa. at Page 611, 182 A.2d at page 200. (Emphasis in original.)

We subsequently approved of immunity for agencies engaged in governmental function in Thomas v. Baird, 433 Pa. 482, 252 A.2d 653 (1969) (Turnpike Authority); Roney v. General State Authority, 413 Pa. 218, 196 A.2d 349 (1964) (General State Authority); and in Anderson

[2] See 81 C.J.S., States §215, Page 1304. For a complete list of jurisdictions so holding, see Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917), and Krause v. State, 31 Ohio St.2d 132, 141, 285 N.E.2d 736 (1972).

Appeal, 408 Pa. 179, 182 A.2d 514 (1962) (Delaware River Port Authority).

[3, 4] While in Pennsylvania we have not before expressly employed the distinction between governmental and proprietary functions when considering the sovereign immunity doctrine, it has nonetheless been implicitly present in our application of the doctrine. In many of our decisions where we have found the bar to exist, we have noted that the function being performed was a governmental one. Roney v. General State Authority, supra, Anderson Appeal, supra, Rader v. Pa. Turnpike Commission, supra, and Merchants' Co. v. Gelder, supra.

In accepting the distinction between governmental and proprietary functions, we are appreciative of the difficulties experienced by our courts using this distinction in the context of the governmental immunity cases and are mindful of the warning of Justice Cohen that "Perhaps there is no issue known to the law which is surrounded by more confusion." Morris v. Mt. Lebanon Twp. Sch. Dist., 393 Pa. 633, 144 A.2d 737 (1958). See also Justice Musmanno's dissent in Boorse v. Springfield Twp., 377 Pa. 109, 103 A.2d 708 (1954).

The sole issue remaining is whether the Liquor Control Board was acting in a governmental or proprietary capacity when it sold young Joseph Biello a bottle of whiskey. In Merchants' Co. v. Gelder, supra, a case where a warehouseman sought contractual relief against the Liquor Control Board for liquor storage, we held that the state could prescribe the manner and procedure to be used in such suits because the board enjoyed the state's immunity. In Gelder, the court reasoned that the board, while storing whiskey as a wholesaler, was performing an essentially governmental function under the exhaustive set of regulations set forth in our Liquor Code. Act of April 12,

1951, P.L. 90, Art. I, §101 et seq., 47 P.S. §1–101 et seq. We are unable to distinguish Gelder from the instant case. The retail sale of liquor herein engaged in by the board is as much a part of the Commonwealth's comprehensive scheme to regulate the sale and consumption of alcohol as is storing the alcohol for distribution to the state stores, the activity in question in Gelder.

We do not believe, as appellant contends, that the Commonwealth is in the liquor business solely in order to raise revenue. If revenue were, in fact, the real purpose for the Liquor Control Board's activities, it would not need to operate all retail outlets. Instead, a tax in the nature of a sales tax could have been enacted to raise all necessary revenue without the concomitant regulation.

[5] Appellant also argues that by enacting §493(1) of the Liquor Code [47 P.S.§–493 (1)], the legislature has in the language of Art. 1, Sec. 11 of the Pennsylvania Constitution, "Directed that the Commonwealth may be sued in cases such as this." Section 493(1) of the Liquor Code provides:

> "It shall be unlawful . . . [f]or . . . the board, or any employe, servant or agent of . . . the board . . . to sell . . . any liquor . . . to any minor. . . ."

According to appellant's argument, the only possible explanation for the Legislature's having made it unlawful for the board to sell liquor to minors was to indicate that the board could be held civilly liable for the consequences of such sales, since no criminal sanctions are imposed. However, Article 1, Section 11 of the Pennsylvania Constitution indicates that if the Commonwealth is to be liable to suit, the Legislature must direct the "manner and courts" in which such suits may be brought, as well as the types of cases in which suit is permitted. We do not

believe that the enactment of §493(1) of the Liquor Code is the type of "direction" which the Constitution requires.

[6] Consequently, because we believe that this case is controlled by Gelder, Article 1, Section 11 of the Pennsylvania Constitution requires that we affirm. Were this a case of first impression, we might interpret the language otherwise. However, the interpretation given by our courts is steeped in historical precedent apparently concurred in by the Legislature and the people of Pennsylvania, in that no effort has been made over the years to change the provision. We, therefore, believe that the meaning of this provision, interpreted as it has been for so long and so consistently, can now only be appropriately changed by legislative action.[3]

Judgment affirmed.

MANDERINO, J., did not participate in the consideration or decision of this case.

EAGEN and POMEROY, JJ., concur in the result.

NIX, J., filed a dissenting opinion in which ROBERTS, J., joins.

NIX, Justice (dissenting).

I respectfully dissent.

Again, the majority of this court has refused to accept its responsibility and strike down an anachronism in the law of Pennsylvania known as sovereign immunity. Although this court and many others throughout this nation have on numerous occasions recognized the doctrine as an obsolete vestige of a distant past, a majority of this court persists in its refusal to remedy the injustices occasioned by

[3] The obvious legislative solution, chosen by such states as New York, Oklahoma, Oregon, Nevada, California and Illinois, is a comprehensive tort claims statute.

the doctrine offering only the weak protestation that the court does not possess the power to abolish this doctrine. This conclusion is premised upon the belief that the genesis of sovereign immunity is not common law but rather that it is mandated by the Constitution of this State. Both the history of this doctrine and the clear language of the Constitution of this State refute this premise.

> In the past, appeals to our Legislature to follow their example have invariably fallen upon deaf ears. See, e.g., Supler v. N. Franklin Twp. Sch. Dist., 407 Pa. 657, 660, 182 A.2d 535 (1962), Stouffer v. Morrision, 400 Pa. 497, 162 A.2d 378 (1960), Morris v. Mt. Lebanon Twp. Sch. Dist., 393 Pa. 633, 635, 144 A.2d 737 (1958). We can only hope that they will now see the wisdom of such action.

Sovereign immunity, in this country, is a derivative of the English feudal system. Under that system the lord of the manor provided courts to resolve disputes arising within the fiefdom and, concomitant with this absolute authority, the lord was deemed to be immune from suit in his court.[1] As the English system developed to a monarchy, the king assumed the powers of the feudal lords and among these powers and prerogatives was his immunity from suit. This thirteenth century version of sovereign immunity existed as the monarch's personal prerogative.[2]

By the sixteenth century, the king's powers were conceptualized as the State, and his prerogative not to be sued became sovereign immunity for the State.[3] That

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[1] Pollock & Maitland, The History of English Law, 518 (1909 ed).

[2] While there is some authority that the doctrine was partially based on the maxim, "The king can do no wrong," (See Blackstone's Commentaries on the Law, Gravits' Ed., at 111) there is evidence that the maxim originally meant that the king was not privileged to do wrong. Borchard, "Government Liability in Tort" 34 Yale L.J. 1, 2 (1924); Ehrlich, Proceedings Against the Crown 1216-1377, at p. 42.

[3] Watkins, "The State As a Party Litigant," 12 John Hopkins University Studies In History and Political Science Series XLV No. 1, at 11 (1927).

immunity could be circumvented in two ways: The king, upon petition, could consent to suit; or The Court of Exchequer could use its King's Bench power to grant relief against the crown. "[I]t would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him."[4] Thus, only rarely did the English version of sovereign immunity operate as a complete bar to a plaintiff's recovery.[5]

From this history it is evident that the concept of State's immunity from suit was a firmly established doctrine of the English common law long before this Commonwealth of Pennsylvania had been conceived. Further, I believe that the language of the Constitution itself fails to provide any basis for the majority's assumption that in Pennsylvania this immunity is constitutionally mandated. Neither within the present Constitution of this Commonwealth nor any of its predecessors can there be found an expressed grant of immunity from suit. To the contrary, Article I, Section 11 merely sets forth the mechanism by which the State may waive this power.[6] It provides that: "Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct." The Constitution is therefore neutral—it neither requires nor prohibits sovereign immunity. The framers of the Constitution accepted the then prevalent concept of sovereignty to include immunity from suit, and attempted through this section to implement the power of the State to consent to actions brought against it.

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[4] Per Atkyns, B., Prawlett v. The Attorney-General (1668), Hadres 465, 468; 145 Eng.Rep. 550, 552. Dyson v. The Attorney-General (1912) 1 K.B. 410, 415.

[5] Muskopf v. Corning Hospital District, 55 Cal.2d 211, 212, 11 Cal.Rptr. 89, 359 P.2d 457, 458 (1961). Interestingly enough, sovereign immunity in the United States developed as an absolute bar and no suit could be brought without expressed waiver of the State. See Borchard, supra note 2, at 4.

[6] The language before us in Article I, Section 11 of our present Constitution is identical to the language used in the original Constitution.

This portion of the Constitution was also directed to resolving the issues of whether there was, in fact, the power to consent to suit and if that power was found to exist, which branch of the government had the power to exercise that judgment. The majority mistakenly concludes that since the framers recognized the need for the resolution of these issues they thereby mandated the doctrine itself. In my judgment it is an unwarranted conclusion to assume from the grant of the power of consent to the legislative branch that this was implicitly an abrogation of the court's traditional powers to abolish common law principles when they no longer meet the needs of the time.

Construing a similar provision in their State Constitution the Supreme Court of Indiana in the case of Perkins v. State, 252 Ind. 549, 551, 251 N.E.2d 30, 32 (1969) noted:

> "We are dealing here not with a constitutional prohibition, but rather with a principle of common law which has the roots in the ancient common law of England . . . ."

See, also State v. Turner, Ind. App. 286 N.E.2d 697 (1972).

This being a principle of common law rather than a constitutional prohibition, it cannot be questioned that the courts have the power to alter that principle when that principle is no longer consistent with the needs of our present society.

> "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at

> once, for an attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible, but if a rule continues to work injustice; it will eventually be reformulated."

Cardozo, J., The Nature of the Judicial Process, 121 (1921). It must be concluded that the time is long overdue when this principle should be reassessed.

Having concluded that this court has the power to abrogate sovereign immunity, I would also conclude that it should do so in this case. By the end of the eighteenth century, the States of this union had accumulated debts resulting from the War of Independence. Most chose to invoke the doctrine of sovereign immunity in order to avoid financial disaster.[7] The decision in Black et al. v. Rempublicam, 1 Yeates 140 (1792) was at least partially motivated by such considerations. See, 1 Yeates at 141.

The fact that sovereign immunity may have possessed a viable rationale at the end of the eighteenth century does not foreclose a reconsideration of that rationale in view of our present day society.

> "If the judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successsors."

Cardozo, J. The Nature of the Judicial Process, 121 (1921).

Whatever validity sovereign immunity may have had in the eighteenth century has disappeared. Modern state governments employ multi-billion dollar budgets to undertake functions which would have been inconceivable under

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[7] For a discussion of the furor caused by the United States Supreme Court's decision in Chisholm v. Georgia, 2 U.S. 419, 1 L.Ed. 440 (1793) permitting a Georgia resident to circumvent South Carolina's sovereign immunity doctrine by suing in a Federal Court, See Currie, Federal Courts, 445 (1968).

the laissez faire philosophy of earlier years. There is absolutely no reason why a state should not insure itself from tort liability (unless it prefers to be self-insured) just as every private enterprise must.[8] The injustice of the doctrine of sovereign immunity is underscored in a case such as the one at bar. Here, the State has entered into the business of selling liquor, and in so doing, it reaps millions in profits.[9] Still, the majority invokes the doctrine of sovereign immunity—a doctrine whose only possible rationale was to protect faltering colonial treasuries—to shield these profits from tort liability.

The overwhelming majority of commentators also conclude that sovereign immunity for tort liability has outlived its usefulness. See, e.g., Prosser on Torts, 3d Ed., p. 1010; Harper, The Law of Torts, (1933); McGuire, "State Liability For Tort," 30 Harv.L.Rev. 20 (1916); Borchard, supra; Leflar and Kantrowitz, "Tort Liability For States" 29 N.Y.U.L. Rev. 1363 (1954). Several of our sister states have judicially abrogated the doctrine of sovereign immunity. See, e.g., Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. California Hospital District, 55 Cal.2d 211, 11 Cal.Rptr. 89, 359 P.2d 457 (1961); Hopper v. State, 93 Idaho 795, 473 P.2d 937 (1970); State v. Turner, Ind.App., 286 N.E. 2d 697 (1972); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) (dictum); Willis v. Department of Conservation and Economic Development, 55 N.J. 534, 264 A.2d 34 (1970).[10]

I recognize that a decision abrogating sovereign immunity would depart from previous doctrine of this court.

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[8] See, Green, "Freedom of Litigation," 38 Ill. L. Rev. 355, 379-383 (1944).

[9] In the fiscal year ending June 29, 1971, the L.C.B. realized a net profit of $149,964,222.25 including taxes.

[10] A great many more states have judicially abrogated the doctrine of immunity for local governments, believing that that immunity also lacks a rational basis. See the dissents of Justice Roberts in Thomas v. Baird, 433 Pa. 482, 252 A.2d 653 (1969), and in Smeltz v. Harrisburg, 440 Pa. 224, 269 A.2d 466 (1970).

However, in urging such a departure, I am comforted by the words of Oliver Wendell Holmes:

> "It is revolting to have no better reason for a rule of law than it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule persists from blind imitation of the past." (Collected Legal Papers of Oliver Wendell Holmes, 187).

The enormity of the inconsistency of the position of the majority is best appreciated by an appraisal of the result that obtains under their holding. Having determined that the regulation of the sale of alcoholic beverages is an appropriate governmental function and that a monopolistic control of retail sales is a permissible means for discharging that responsibility they then sanctioned the use of the State's immunity to preclude redress for an apparently clear tortious performance of that obligation.

I am completely at a loss to find any justification for allowing such an unjust result and I therefore dissent.

ROBERTS, J., joins in this dissent.

APPENDIX C

Here is set forth the unreported Opinion of the Supreme Court of Pennsylvania in the case of *Ayala, J.R. et al. v. Philadelphia Board of Public Education*, decided May 8, 1973, printed in the Legal Intelligencer May 31, 1973.

RIGHT TO SUE LOCAL GOVERNMENTS UPHELD

The Supreme Court of Pennsylvania has ruled that municipal corporations and quasi-corporations are no longer immune from tort liability. In the case of Ayala, Jr., et al. v. Philadelphia Board of Public Education, the court upheld the right to sue the Board of Public Education for negligence.

The majority opinion, filed on May 23, 1973, was delivered by Mr. Justice Roberts; Mr. Justice Manderino filed a concurring opinion and Mr. Chief Justice Jones, Mr. Justice Eagen and Mr. Justice O'Brien dissented.

The opinions are as follows:

Majority Opinion

Appellants, William Ayala and William Ayala, Jr., instituted this action to recover damages for injuries suffered by William, Jr., when his arm was caught in a shredding machine in the upholstery class of the Carrol School in Philadelphia. As a result of these injuries, the 15-year-old student's arm was amputated.

Appellants alleged that appellee school district, through its employes, was negligent in failing to supervise the upholstery class, in supplying the machine for use without a proper safety device, in maintaining the machine in a dangerous and defective condition, and in failing to warn the children of the dangerous condition. Appellee, the Philadelphia Board of Public Education, interposed preliminary objections asserting the defense of governmental immunity. These objections were sustained and the Superior Court affirmed in a per curiam order; Ayala v. Philadelphia Board of Public Education, 223 Pa. Superior Ct. 171, 297 A.2d 495 (1972)[1] We granted allocatur.

We now hold that the doctrine of governmental immunity[2] long since devoid of any valid justification, is abolished in this Commonwealth.[3] In so doing, we join the ever-increasing number of jurisdictions which have judicially abandoned this antiquated doctrine. See, e.g., Spencer v. General Hospital of District of Columbia, 425 F.2d 479 (D.C. Cir., 1969); Campbell v. State, 284 N.E.2d 733 (Ind., 1972) (citing with approval Klepinger v. Board of Commissioners, 143 Ind. App. 155, 239 N.E.2d 160 (1968), and Brinkmand v. City of Indianapolis, 141 Ind. App. 662, 231 N.E.2d 169 [1967]); Evans v. Board of County Commissioners, 482 P.2d 968 (Colo., 1971); Flourney v. School District No. 1, 482 P.2d 966 (Colo., 1971); Smith v. State, 93 Idaho 795, 473 P.2d 937 (1970); Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970); Becker v. Beaudoin, 261 A.2d 896 (R.I., 1970); Johnson v. Municipal University of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967) (relying on Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 [1963]); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Sherbutte v. Marine City, 374 Mich. 48, 103 N.W.2d 920 (1964); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Scheele v. City of Anchorage, 385 P.2d 582 (Alaska 1963); City of Fairbanks v. Schaible, 375 P.2d 201 (Alaska, 1962); Spanel v. Mounds View School District No. 621, 264 Minn. 279, 118 N.W.2d 795 (1962); Holytz v. City of Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962); Muskopf v. Corning Hospital District, 55 Cal.2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Molitor v. Kaneland Community Unit District No. 302, 18 Ill.2d 11, 163 N.E.2d 89 (1959);

Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).[4]

I.

It is generally agreed that the historical roots of the governmental immunity doctrine are found in the English case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). See, e.g., Parish v. Pitts, supra; Molitor v. Kaneland Community Unit District No. 302, supra; Prosser, Handbook on the Law of Torts 1004 (3d ed. 1964); Statson, Governmental Tort Liability Symposium, 29 N.Y.U.L. Rev. 1321 (1954); Borchard, Governmental Liability in Tort, 34 Yale L.J. 1 (1924). There, the court, in extending immunity to an unincorporated county, expressed the fear that if suits against such political subdivisions were permitted, there would be "an infinity of actions": Russell v. Men of Devon, supra, at 672, 100 Eng. Rep. at 362. That court was also influenced by the absence of a fund "out of which satisfaction is to be made." Id. Finally, Justice Ashurst, expressing the eighteenth century societal evaluation of the individual and local governmental interests, observed that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." Id.

While some attribute the immunity of municipal corporations and quasi-corporations to an extention of the theory that "the King can do no wrong," it has been noted that in Russell v. Men of Devon there is no mention of that phrase. Spanel v. Mounds View School District No. 621, supra at —, 118 N.W.2d at 797. Rather,

"[e]very reason assigned by the court [in Russell] is born of expediency. The wrong to plaintiff is submerged in the convenience of the public. No moral, ethical, or rational reason for the decision is advanced by the court except the practical problem of assessing damages against individual defendants": Id.[5]

Additionally, it has been suggested that the doctrine of governmental immunity was a result of the English courts' difficulties with the principle of respondeat superior.

"The attribution of an officer's torts to the state was not obvious on general principle. If the judges found it difficult to attribute to a private principal the tort of an agent chosen by him to work within rather limited confines, how much more difficult to attribute to that undefinable entity, the state, the illegal acts of its various officers performing as a body a most disparate collection of functions.

"In short, the source of the 'mystery' lay not solely in the doctrine of sovereign immunity. Respondeat superior had caused difficulties as early as the nineteenth century in England, when the question arose whether the King, who by that time could be sued in contract whenever 'right should be done,' should be held for his officers' torts. The courts denied such relief, reasoning that respondeat superior was based on the identity of principal and agent, because the King could not himself commit a tort, the attribution failed for want of a competent principal": Jaffe, Suits Against Governments and Officers: Damage Actions, 77 Harv. L. Rev. 209, 210 (1963) (footnote omitted).

Whatever may have been the actual basis for Russell v. Men of Devon, the doctrine it advanced was soon applied in the United States. In Mower v. Leicester, 9 Mass. 247 (1812), the Massachusetts court, relying upon Russell, held that an incorporated county was immune from liability for the tortious conduct of its employes. As to the adoption of this doctrine, it has been observed:

". . . the only similarity between the situation in New England and the Russell case lay in the fact that the defendants were counties. The New England county was incorporated, had a corporate fund and the means of enlarging it by taxation and was charged by statute with

the duty of keeping highways in repair. Under the authority of Russell v. Devon, therefore, practically no reason for immunity can be found in these circumstances to exist, yet the Massachusetts court passed judgment for the defendant on the unconvincing ground that the county was a quasi corporation created by the legislature for purposes of public policy and not voluntarily, like a city, and that as a State agency it was therefore immune. This poorly reasoned decision, based upon a case which contradicts rather than sustains it, has been followed very generally in New England and has become the 'common law' of the states of the United States, with few exceptions": Borchard, supra at 42 (footnote omitted). "On such slender grounds have rested thousands of decisions requiring the assumption by the injured parties of damages inflicted by public corporations." Statson, supra at 1321.

Pennsylvania joined the numerous States adopting the immunity doctrine and, in Ford v. School District, 121 Pa. 543, 15 Atl. 812 (1888), held that school districts, as quasi-corporations, are not liable for the tortious conduct of employes. The court's decision was motivated by factors similar to those which influenced the English court in Russell. Initially, the court noted that school districts are agents of the Commonwealth "and are made quasi-corporations for the sole purpose of the Commonwealth's system of public education." Id. at 547, 15 Atl. at 815. More importantly, the court was reluctant to impose liability because "the act of assembly provides no fund out of which the directors can pay damages resulting from their own misconduct or that of their officers." Id. The court further stated that "individual advantage must give way to the public welfare." Id. at 549, 15 Atl., at 815-16.

Although the English courts abandoned the doctrine and permitted suits against municipalities and school districts,

this Commonwealth continued to deny recovery. See, e.g., Kesman v. Fallowfield Township School District, 345 Pa. 457, 29 A.2d 17 (1942); Devlin v. Philadelphia School District, 337 Pa. 209, 10 A.2d 408 (1940); Carlos v. Scranton School District, 319 Pa. 417, 179 Atl. 561 (1935). In Morris v. Mount Lebanon Township School District, 393 Pa. 633, 636, 144 A.2d 737, 738 (1958), the court refused to completely abrogate the immunity doctrine but held that school districts, like municipal corporations, "are not immune from liability in tort for the negligent acts of their servants committed in the course of the [school district's] proprietary functions." See also Flinchbaugh v. Cornwall-Lebanon School Authority, 438 Pa. 407, 264 A.2d 708 (1970); Dillon v. York City School District, 422 Pa. 103, 220 A.2d 896 (1966); Shields v. Pittsburgh School District, 408 Pa. 388, 184 A.2d 240 (1962); Supler v. Franklin Township School District, 407 Pa. 657, 182 A.2d 535 (1962).

Thus, until the present action, we have retained the archaic and artificial distinction between tortious conduct arising out of the exercise of a proprietary function and tortious conduct arising out of exercise of a governmental function.

II.

Today, we conclude that no reasons whatsoever exist for continuing to adhere to the doctrine of governmental immunity. Whatever may have been the basis for the inception of the doctrine, it is clear that no public policy considerations presently justify its retention.

Governmental immunity can no longer be justified on "an amorphous mass of combrous language about sovereignty. . . .": Leflar and Kantrowitz, Tort Liability

of the States, 29 N.Y.U.L. Rev. 1363, 1364 (1954). As one court has stated:

"'. . . it is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.' Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480, 482. Likewise, we agree with the Supreme Court of Florida that in preserving the sovereign immunity theory, courts have overlooked the fact that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based": Molitar v. Kaneland Community Unit District No. 302, supra at –, 162 N.E.2d at 94. See also Evans v. Board of County Commissioners, supra; Hargrove v. Town of Cocoa Beach, supra.

Moreover, we are willing to perpetuate the notion that "it is better than an individual should sustain an injury than that the public should suffer an inconvenience": Russell v. Men of Devon, supra at 672, 100 Eng. Rep. at 362. This social philosophy of nonliability is "an anachronism in the law of today": Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 502, 208 A.2d 193, 201 (1965). As has been noted:

"The social climate which fostered the growth of absolutism and the devine right of kings in England has long since been tempered with the warm winds of humanitarianism and individual freedom. The changes which have

occurred in the last century with respect to the imposition of liability upon private corporate enterprises of any kind are wellknown. Workmen's compensation laws have replaced the old theories which permitted the corporate organizations to escape liability under the fellow-servant rule or the doctrine of assumption of risk. Liability may now be predicated without fault merely on grounds that potential injuries to individuals must be calculated as a part of the cost of doing business, and must be paid for by the business enterprise. There is widespread acceptance of a philosophy that those who enjoy the fruits of the enterprise must also accept its risks and attendant responsibilities": Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41, 48 (1949) (emphasis added) (footnote omitted).

Recently, this court reiterated the prevailing philosophy that liability follows tortious conduct. In Niederman v. Brodsky, 436 Pa. 401, 403, 261 A.2d 84, 85 (1970), we said:

" 'It is fundamental to our common law system that one may seek redress for every substantial wrong. "The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct. . ." '; Battalla v. State, 10 N.Y.2d 237, 240, 219 N.Y.S. 2d 34, 36, 176 N.E.2d 729, 730 (1961)."

See also Stone v. Arizona Highway Commission, supra, at —, 381 P.2d at 112; Muskopf v. Corning Hospital District, supra, at —, 359 P.2d at 462, 11 Cal. Rptr. at —.

Appellee offers no reason, and we are unable discern one, for permitting governmental units to escape the effect of this fundamental principle.

"As we have stated many times before, today cities and states are active and virile creatures capable of inflicting great harm, and their civil liability should be co-extensive. Even though a governmental entity does not profit from its

projects, the taxpaying public nevertheless does, and it is the taxpaying public which should pay for governmental maladministration. If the city operates or maintains injury-inducing activities or conditions, the harm thus caused should be viewed as a part of the normal and proper costs of public administration and not as a diversion of public funds. The city is a far better loss-distributing agency than the innocent and injured victim. See 2 Harper and James, Torts, 622 (1956)": 32 American Trial Lawyers J. 284, 288 (1968).

We must also reject the fear of excessive litigation as a justification for the immunity doctrine. Empirically, there is little support for the concern that the courts will be flooded with litigation if the doctrine is abandoned. See, e.g., David, Tort Liability of Local Government: Alternatives to Immunity from Suit or Liability, 6 U.C.L.A. L. Rev. 1 (1959); Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437, 469 (1941). So, too, what this court said in Niederman v. Brodsky, supra at 412, 261 A.2d at 89, is applicable here:

". . . more compelling than an academic debate over the apparent or real increases in the amount of litigation, is the fundamental concept of our judicial system that any such increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights. 'It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation"; and its is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do.' Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939). We obviously do not accept the 'too much work to do' rationale. We place the responsibility exactly where it should be:

not in denying relief to those who have been injured, but on the judicial machinery of the Commonwealth to fulfill its obligation to make itself available to litigants. Who is to say which class of aggrieved plaintiffs should be denied access to our courts because of speculation that the workload will be a burden? Certainly this Court is unwilling to allow such considerations to influence a determination whether a class of litigants will be denied or permitted to seek adjudication of its claims." (Emphasis in original.)

Equally unpersuasive is the argument advanced in Russell v. Men of Devon, and Ford v. School District that immunity is required because governmental units lack funds from which claims could be paid. It is argued that funds would be diverted to the payment of claims and the performance of proper governmental functions would be obstructed. Initially, we note our disagreement with the assumption that the payment of claims is not a proper governmental function. "As many writers have pointed out, the fallacy in [the no-fund theory] is that it assumes the very point which is sought to be proved, i.e., that payment of damage claims is not a proper purpose": Molitor v. Kaneland Community Unit District No. 302, supra at —, 163 N.E.2d at 95.

Additionally, the empirical data does not support the fear that governmental functions would be curtailed as a result of liability for tortious conduct. One commentator has written:

"Figures actually complied showing the claims experience in typical cities show that the spectre of the crippling judgment, as a deterrent to abrogation of procedural or substantive immunities, so far as [sic] not materialized in any great degree. The force of the 'crippling judgment' may be vitiated by self-insurance or commercial insurance . . . So far as known, municipal insolvency proceedings in the federal courts have not occurred because of tort

judgments": David, supra at 53. See also Parish v. Pitts, supra at —, 429 S.W.2d at 51; Note, Municipal Liability in Pennsylvania—Checkered Immunity, 100 U. Pa. L. Rev. 92, 105 (1951). The availability of public insurance removes what was the underlying reason for Men of Devon. Williams v. City of Detroit, supra at —, 111 N.W.2d at 24 (Edwards, J.).

Finally, this court addressed the financial burden argument in Flagiello v. Pennsylvania Hospital, supra. There, in rejecting the argument as it applied to the immunity of charitable institutions, we said:

"The voluminous arguments advanced by the defendant hospital and the amicus curiae, on the subject of the financial problems of hospitals today, are, while interesting and enlightening, wholly irrelevant to the issue before us. We have a duty to perform and that is to see that justice, within the framework of law, is done. Our function is to decide cases as they come before us on the pertinent facts and law. What could happen in the event the plaintiff obtains a verdict is not an issue here. The pleadings in this litigation require that we decide whether the defendant hospital should answer the charges brought against it by the plaintiff": Id. at 503-04, 208 A.2d at 202.[7]

Thus, we must agree with Chief Justice Traynor of the California Supreme Court that "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia": Muskopf v. Corning Hospital District, supra at —, 359 P.2d at 460, 11 Cal. Rptr. at —. Moreover, the distinction between governmental and proprietary functions "is probably one of the most unsatisfactory known to the law, for it has caused confusion not only among the various jurisdictions but almost always within each jurisdiction": Davis, Administrative Law Treatise §25.07 at 460 (1958).

This court recognized the general dissatisfaction with this distinction when we stated: "Perhaps there is no issue known to the law which is surrounded by more confusion than the question whether a given municipal operation is governmental or proprietary in nature": Morris v. Mount Lebanon Township School District, supra at 637, 144 A.2d at 739. Compare Shields v. Pittsburgh, supra (operation of playground during vacation is a governmental function) with Morris v. Mount Lebanon Township School District, supra, decided four years earlier, (operation of summer recreation program is a proprietary function.)

Recently, the Indiana Supreme Court echoed the widespread displeasure with the governmental-proprietary distinction:

"Exactly what constitutes a proprietary function as opposed to a governmental function has never been clearly enunciated by the courts, and this failure to establish a criteria has led to the generally confused state of the bench and bar in the application of the doctrine of sovereign immunity. Deciding on useful guidelines between rather obscure, whimsical notions enunciated by the appellate courts throughout the country has caused enormous conflicts in the courts in the past decade": Campbell v. State, supra, at 735.

In now rejecting the immunity doctrine and the "legalistic distinctions that have only remote relationship to the fundamental considerations of municipal tort responsibility" (Fuller and Casner, supra at 443), we recognize, as did Dean Prosser, that:

"Virtually all writers have agreed that no one of these reasons for denying liability is sound, and all of them can be found to have been rejected at one time or another in the decided cases. The current of criticism has been

that it is better that the losses due to tortious conduct should fall upon the municipality rather than the injured individual, and that the torts of public employees are properly to be regarded, as in other cases of vicarious liability, as a cost of the administration of government, which should be distributed by taxes to the public": Prosser, supra, at 1004-05 (footnotes omitted).

Imposition of tort liability will, thus, be more responsive to current concepts of justice. Claims will be treated as a cost of administration and losses will be spread among all those benefited by governmental action. See, e.g., Stone v. Arizona Highway Commission, supra; Muskopf v. Corning Hospital District, supra; Smith, supra at 56.

Moreover, "where governmental immunity had the effect of encouraging laxness and a disregard of potential harm, exposure of the government to liability for its torts will have the effect of increasing governmental care and concern for the welfare of those who might be injured by its actions": Note, The Discretionary Exception and Municipal Tort Liability: A Reappraisal, 52 Minn. L. Rev. 1047, 1057 (1968). As Dean Prosser has written:

"The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive": Prosser, supra at 23.

III.

Appellee seems to recognize that significant public policy considerations demand abolition of the govern-

mental immunity doctrine. Indeed, appellee does not attempt to justify retention of immunity on policy grounds. Rather, it contends that abrogation, if it is to be achieved, should be accomplished by legislative direction rather than by judicial determination.

In response to arguments that the court should defer to legislative action, we stated in Flagiello v. Pennsylvania Hospital, supra, at 503, 208 A.2d at 202: "[T]he controversial rule [charitable immunity] is not the creation of the Legislature. This Court fashioned it, and, what it put together, it can dismantle." (Emphasis added.)

Again in Falco v. Pados, 444 Pa. 372, 382, 282 A.2d 351, 356 (1971) (quoting Badigian v. Badigian, 9 N.Y.2d 472, –, 174 N.E.2d 718, 724, 215 N.Y.S.2d 35, – (1961), we said:

"'. . . it is urged, that, if there is a remedy it must be given by the Legislature, if there is to be a change, it may not be effected by the courts. This court has heard such arguments before and has answered them by saying that, where the rule is court made, it may be court modified if reason and a right sense of justice recommend it (citations omitted).' So too, in recent years this Court has had the fortitude and wisdom to effectuate changes in the law where 'reason and a right sense of justice' recommend it."

Similarly, here, the doctrine of governmental immuity, judicially imposed, may be judicially terminated. "Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty, to abolish that immunity. 'We closed our courtroom doors without legislative help, and we can likewise open them'": Molitor v. Kaneland Commuity Unit District No. 302, supra at –, 163 N.E.2d at 96. See also Spencer v. General Hospital District of Columbia, supra; Campbell v. State, supra; Klepinger v. Board of Commissioners, supra; Brinkman v. City of Indianapolis,

supra; Evans v. Board of County Commissioners, supra; Flourney v. School District No. 1, supra; Smith v. State, supra; Willis v. Department of Conservation and Econ. Dev., supra; Becker v. Beaudoin, supra; Johnson v. Municipal University of Omaha, supra; Brown v. City of Omaha, supra; Parish v. Pitts, supra; Veach v. City of Phoenix, supra; Haney v. City of Lexington, supra; Sherbutte v. Marine City, supra; Rice v. County, supra; Scheele v. City of Anchorage, supra; City of Fairbanks v. Schaible, supra; Spanel v. Mounds View School District No. 621, supra; Holytz v. City of Milwaukee, supra; Muskopf v. Corning Hospital District, supra; Williams v. City of Detroit, supra; Hargrove v. Town of Cocoa Beach, supra.[8]

On prior occasions, we recognized that errors of "history, logic and policy" were responsible for the development of the governmental immunity doctrine: Morris v. Mount Lebanon Township School District, supra at 635, 144 A.2d at 738. See also Dillon v. York City School District, supra. Nevertheless, we suggested that the legislature should undertake the abrogation of governmental immunity. Id. These suggestions do not preclude our court from now abolishing this judicially created doctrine. In so doing, we join numerous other jurisdictions which similarly, by judicial decision, have abandoned governmental immunity notwithstanding prior deference to legislative action. See, e.g., Parish v. Pitts, supra; Haney v. City of Lexington, supra; Spanel v. Mounds View School District No. 621, supra; Holytz v. City of Milwaukee, supra.

The Wisconsin, Supreme Court, for example, prior to its decision in Holytz v. City of Milwaukee, supra, had expressed the view that any change in the governmental immunity doctrine must come from the legislature. See Britten v. Eau Claire, 260 Wis. 382, 386, 51 N.W.2d 30, 32 (1051). Yet, in Holytz, that court concluded, as we do here:

"We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments": Id. at —, 115 N.W.2d at 623.

It must be concluded, therefore, that:

"A rule which in its origins was the creation of the courts themselves, and was supposed in the making to express the mores of the day, may be abrogated by the courts when the mores have so changed that perpetuation of the rule would do violence to the social conscience": Cardozo, The Growth of the Law 136-37 (1924).

Our decision is in complete harmony with this jurisprudential principle.

IV.

Appellee urges that abrogation of the immunity doctrine disturbs the principle of stare decisis. It seems obvious, however, that appellee not only misconceives the mission of the stare decisis principle, but also ignores the admonition of Chief Justice Cardozo:

"We tend sometimes, in determing the growth of a principle or a precedent, to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only, in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birthmarks of their origin. They are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commended itself at the moment between competing possibilities": Id. at 69-70 (footnote omitted).

The doctrine of governmental immunity, created centuries ago, is, like most other principles, "a provisional hypothesis." As stated in Smith v. State, supra at —, 473 P.2d at 943:

"When precedent is examined in the light of modern reality and it is evident that the reason for the precedent no longer exists, the abandonment of the precedent is not a destruction of stare decisis but rather a fulfillment of its proper function.

"Stare decisis is not a confining phenomenon but rather a principle of law. And when the application of this principle will not result in justice, it is evident that the doctrine is not properly applicable."

This court has repeatedly recognized that the principle of stare decisis is not a "confining phenomenon." We are mindful of the observation of Mr. Justice Schaefer, of the Supreme Court of Illinois:

"Precedent speaks for the past; policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present": Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 24 (1966).

In Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), we abandoned the "place of wrong" choice-of-law rule. Over claims of stare decisis, we stated:

"Although adherence to that principle is generally a wise course of judicial action, it does not rigidly command that we follow without deviation earlier pronouncements which are unsuited to modern experience and which no longer adequately serve the interests of justice. Surely, the orderly development of the law must be responsive to new conditions and to the persuasion of superior rea-

soning. '[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.' Cardozo, The Nature of the Judicial Process 150-51 (1921)": Id. at 23, 203 A.2d, at 806.

Again, in Olin Mathieson C. Corp. v. White C. Stores, 414 Pa. 95, 100, 199 A.2d 266, 268 (1964) (holding unconstitutional the Pennsylvania Fair Trade Act as applied to nonsigners of price maintenance contracts), we said:

"While it is true that great consideration should always be accorded precedent, especially one of long standing and general acceptance, it doesn't necessarily follow that a rule merely established by precedent is infallible. Moreover, the courts should not perpetrate error solely for the reason that a previous decision, although erroneous, has been rendered on a given question. This is particularly true where no fixed rights of property are involved or where great injustice or injury will result by following the previous erroneous decision. If it is wrong it should not be continued. Judicial honesty dictates corrective action."

In Flagiello v. Pennsylvania Hospital, supra, we abrogated the outmoded doctrine of charitable immunity. In response to claims of stare decisis, this court said:

"Stare decisis is not an iron mold into which every utterance by a court, regardless of circumstances, parties,

economic barometer and sociological climate, must be poured, and, where, like wet concrete, it must acquire an unyeilding rigidity which nothing later can change.

"Chief Justice Von Moschzisker of this Court said: '. . . if, after thorough examination and deep thought a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent.' (Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 Harv. L. R. 409, at 414.)": Id. at 511, 208 A.2d, at 205.

The cases are numerous in which this court has rejected principles which were "out of accord with modern conditions of life." See, e.g., Commonwealth v. McCusker, 448 Pa. 382, 292 A.2d 296 (1972) (rejected rule that psychiatric evidence is inadmissible in murder prosecution for purposes of determining whether defendant acted in heat of passion); Commonwealth v. Archambault, 448 Pa. 90, 290 A.2d 724 (1972) (rejected prior cases concerning scope of permissible remarks by a judge to jury); Falco v. Pados, supra, (abrogated parental immunity); Connestoga National Bank v. Patterson, 442 Pa. 289, 275 A.2d 6 (1971) (reversed prior rule regarding procedure afforded protesting banks in branch bank application situations); Smalich v. Westfall, 440 Pa. 409, 269 A.2d 475 (1970) (rejected prior rule imputing contributory negligence of driver to owner-passenger); Papieves v. Kelly, 437 Pa. 373, 268 A.2d 118 (1970) (recovery permitted for emotional distress resulting from intentional or wanton misconduct); Niederman v. Brodsky, supra (abolished impact rule); Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968) (rejected prior limitation on a landlord's liability for defective conditions); Kasab v. Central Soya, 432 Pa. 217, 246 A.2d (1968) (eliminated vertical privity requirement); Beckham v. Travelers Ins. Co., 424 Pa. 107, 255 A.2d 532

(1967) (abandoned distinction between accidental means and accidental results); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) (adopted Restatement, Second, Torts §402A); Campbell v. Fiorot, 411 Pa. 157, 191 A.2d 657 (1963) (repudiated prior rule regarding evidence of skidding car); Catherwood Trust, 405 Pa. 61, 173 A.2d 86 (1961) (abolished Pennsylvania Rule of Apportionment); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960) (rejected prior case law which held infant does not have a cause of action for prenatal injuries); Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958) (changed felony murder rule).

The controlling principle which emerges from these and other decisions is clear—the doctrine of stare decisis is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.

V.

Finally, it is suggested that if we abolish governmental immunity, our decision to do so should not apply to the instant case.[9] We refused to adopt that suggestion in Falco v. Pados, supra, as well as numerous other cases. See, e.g., Commonwealth v. McCusker, supra; Commonwealth v. Archamabult, supra; Connestoga National Bank v. Patterson, supra; Smalich v. Westfall, supra; Papieves v. Kelly, supra; Neiderman v. Brodsky, supra; Reitmeyer v. Sprecher, supra; Kasab v. Central Soya, supra; Beckham v. Travelers Ins. Co., supra; Webb v. Zern, supra; Flagiello v. Pennsylvania Hospital, supra; Griffith v. United Air Lines, Inc., supra; Olin Mathieson C. Corp. v. White C. Stores, supra. Cf. Incollingo v. Ewing, 444 Pa. 299, 282 A.2d 206 (1971). On the basis of these decisions, appellee's argument that we do not apply our newly adopted rule to the facts of this case must be rejected.[10]

Having concluded that local governmental units, municipal corporations and quasi-corporations, are no longer immune from tort liability, the order sustaining appellee's preliminary objections is reversed and the record remanded for proceedings consistent with this opinion.

Appendix

Position of States with regard to Doctrine of Governmental Immunity*

Judicially Abrogated
- Alaska
- Arizona
- California
- Colorado
- Florida
- Idaho
- Illinois
- Indiana
- Kentucky
- Louisiana
- Michigan
- Minnesota
- Nebraska
- Nevada
- New Jersey
- Rhode Island
- Wisconsin
- District of Columbia

Statutorily Abrogated
- Hawaii
- Iowa
- New York
- Oklahoma

Oregon
Utah
Washington

Modified

Connecticut
South Carolina
Texas

Insurance-Waiver Theory

Georgia
Kansas
Maine
Mississippi
Missouri
Montana
New Hampshire
New Mexico
North Carolina
North Dakota
Ohio
Tennessee
Vermont
West Virginia
Wyoming

Common Law

Alabama
Arkansas**
Delaware
Maryland
Massachusetts
Pennsylvania***
South Dakota
Virginia

Concurring Opinion

I join in the majority opinion by Mr. Justice Roberts. I should like to add that the doctrine of governmental immunity is unconstitutional as is the doctrine of sovereign immunity. No branch of government—the executive, the legislative, or the judicial branch—can deprive a citizen of proper redress for a wrong. The denial of justice in any case is not constitutionally permitted. See Brown v. Commonwealth of Pennsylvania, — Pa. —, — A.2d — (1973) dissenting opinion by Mr. Justice Manderino).

Footnotes

1. Judge Hoffman filed a concurring opinion in which Judge Spaulding joined. Ayala v. Philadelphia Board of Public Education, 233 Pa. Superior Ct. 171, 172, 297 A.2d 495; 496 (1972). Judge Packel also filed a concurring opinion. Id. at 175, 297 A.2d at 497. These opinions expressed discontent with the governmental immunity doctrine but stated that "it is for the highest court of the Commonwealth to abrogate the inequities of the doctrine of sovereign immunity." Id. (Hoffman, J., concurring).

2. We are not, here, confronted with the sovereign immunity of the Commonwealth.

3. Prior decisions to the contrary are overruled. See, e.g., Smeltz v. Harrisburg, 440 Pa. 224, 269 A.2d 466 (1970); Dillon v. York City School District, 422 Pa. 103, 220 A.2d 896 (1966); Shields v. Pittsburgh School District, 408 Pa. 388, 184 A.2d 240 (1962); Morris v. Mount Lebanon Township School District, 393 Pa. 633, 144 A.2d 737 (1958); Boorse v. Springfield Township, 377 Pa. 109, 103 A.2d 708 (1954); Carlo v. Scranton School District, 319 Pa. 417, 179 Atl. 561 (1935); Ford v. School District, 121 Pa. 543, 15 Atl. 812 (1888).

4. See Appendix for a compilation of the present position of each state with regard to the doctrine of governmental immunity.

5. Extension of the theory that the "King can do no wrong" to political subdivisions is especially suspect in light of Professor Jaffe's observation that, historically, the "major effect of the doctrine of sovereign immunity was procedural. Claims in form 'against the Crown' were to be pursued by petition of right." Jaffee, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 18 (1963.) See also Borchard, Government Liability in Tort, 34 Yale L. J. 1 (1924).

6. See cases cited in Williams v. City of Detroit, 364 Mich. 231, —, 111 N.W.2d 1, 24 (1961) (Edwards, J.).

7. It is interesting to note that the court in Ford v. School District, supra note 3, in concluding that school districts are immune, analogized to the immunity of charities. However, in Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A.2d 193 (1965), we abolished the doctrine of charitable immunity.

(footnotes continued)

8. The notion that the immunity of the school district is linked to the sovereign immunity of the Commonwealth and that, therefore, only the Legislature may act, is a notion without present vitality. Underlying this assumption is the theory that there is a distinction between municipal corporations and quasi-corporations, the latter being agents of the Commonwealth and, thus, entitled to the sovereign immunity enjoyed by the Commonwealth. See Ford v. School District, supra note 3.

We expressly rejected this theory in Morris v. Mount Lebanon Township School District, supra at 636, 144 A.2d at 738 where this court said:

"Although early cases appear to have distinguished between municipal corporations proper, (cities and boroughs), and quasi-corporations, (counties, townships and school districts), stating that the latter were subject to a lesser liability, these decisions meant no more than that as quasi-municipal corporations they exercised predominantly 'governmental' functions, the area of their potential liability was more limited." (Footnotes omitted) (Emphasis in original.)

Thus, municipal corporations and quasi-corporations are on an equal level with regard to immunity. The immunity, of both these types of governmental units was judicially created and may be judicially abolished. Whatever may be the need for legislative action in the area of sovereign immunity, it is clear that there is no requirement for legislative action to abolish—as we do here—the immunity of municipal corporations and quasi-corporations.

9. In Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 364, 53 S.Ct. 145, 148 (1932), the United States Supreme Court stated: "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

10. Recently, the New Jersey Supreme Court noted, ". . . law is not likely to keep up with the needs of society if the litigant who successfully champions a cause is left with only that distinction": Willis v. Department of Conservation and Econ. Dev., 55 N.J. 534, — 264 A.2d 34, 37-38 (1970).

* This compilation is based on material presented in Restatement, Second, Torts §895A at 12-20 (Tentative Draft, March 30, 1973).

** Judicially abolished but statutorily reinstated.

*** Until today Pennsylvania retained the common law immunity.